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NO. 83-

IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1983

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FRED EARULLO and LOUIS KLISZ  
Petitioners

v.

PEOPLE OF THE STATE OF ILLINOIS  
Respondent

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE APPELLATE COURT OF ILLINOIS

---

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## QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Whether the defendants were denied due process by the refusal of the court to consider evidence vital to the defense; and the court's confusion over evidence vital to the defense.

2. Whether the defendant Louis Klisz's constitutional right to remain silent was violated by testimony that he had refused to make a statement in the presence of a court reporter.

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, was rendered on March 25, 1983. (People v. Earullo, et al., 113 Ill. App.3d 774) The Supreme Court denied the defendants' petition for leave to appeal on October 4, 1983.

## PARTIES BELOW

The names of all parties to this petition appear in the caption of the case.

## JURISDICTION

On March 25, 1983, the Appellate Court of Illinois, First District, affirmed the conviction of the defendants. On October 4, 1983, the Supreme Court of Illinois denied the defendants' Petition for Leave to Appeal. This court's jurisdiction is invoked under 28 U.S.C § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV.

§ 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### Amendment IV

The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### STATEMENT OF THE CASE

Fred Earullo and Louis Klisz were two Chicago Police Officers who were making an arrest of a violent person in broad daylight in front of a large number of witnesses. They were attempting to remove him from a Chicago Transit Authority train. The evidence established beyond question that the defendants, after having arrested Richard Ramey, turned him over to other police officers at the station at approximately 5:00 p.m. on July 6, 1980. At that time, Ramey was alive and, according to all of the witnesses, was still violent and abusive. The defendants had nothing further to do with him. Later, Ramey

was taken to the hospital by other police personnel. At the hospital he was so violent that he was required to be placed in restraints. He suffered a cardiac arrest at 9:00 p.m. that night and died.

The principal witness for the State was the medical examiner, Dr. Robert Stein, who testified that he performed the autopsy on the body of Richard Ramey and discovered numerous fractures, including a through and through break of the sixth cervical vertebra at the neck. He testified that the only thing holding the head was muscle fiber and that the person could not freely move his head around and would not be able to keep his head up and turn it. Anyone with that type of break would experience great pain. He also testified that Ramey's death was caused by external and internal injuries due to blunt trauma. In his opinion the blunt trauma was administered to Ramey two hours or less before death. When the defendant Louis



Klisz testified he was cross-examined by the State's Attorney and was required to state, over objection, that he had refused to make a statement in the presence of a court reporter.

Both defendants were convicted of involuntary manslaughter in the death of Richard Ramey and official misconduct. Klisz was sentenced to the Illinois State Penitentiary for a term of eight years; and Earullo was sentenced to the Illinois State Penitentiary for a term of two years. The Appellate Court reduced Klisz's sentence to a term of five years.

#### REASONS FOR GRANTING THE WRIT

##### I.

THE DECISION BELOW SANCTIONS A DENIAL OF DUE PROCESS BY THE TRIAL COURT'S REFUSAL TO CONSIDER EVIDENCE VITAL TO THE DEFENDANT'S CASE; AND BY HIS CONFUSION OVER EVIDENCE VITAL TO THE DEFENDANT'S CASE.

The overriding question involved in this case was the cause of death. It is beyond question that the deceased left the custody of the defendants four hours before death. All witnesses testified that he remained violent, argumentative and abusive while he was still in the custody of other police officers. Even when he was taken to the hospital he was still violent. If the medical examiner's testimony was correct, (and he was the prime witness for the prosecution) that the deceased died from injuries inflicted two hours or less before his death, then it necessarily follows that the defendants could not have been the persons who inflicted the injuries that caused his death. The record clearly shows that the trial judge was confused on this point when he said this in his ruling denying the motion for a new trial:

The question of the time lapse from when the injuries were received by Richard Ramey were first raised by my questioning of the witness, the doctor. The purpose was to satisfy the court as to when the contusions were--whether they were recent in origin as contrasted to old injuries.

No questions were ever raised as to when the internal injuries to the deceased had occurred. On the basis of the foregoing conclusion by this court the motions are hereby denied. Thank you.

This finding shows that the court misinterpreted the evidence or made a logically inconsistent finding. If the court was saying that it was satisfied that the evidence established that the contusions were caused by trauma inflicted less than two hours before his death, then he must have been satisfied that the defendants did not inflict those injuries that caused contusions but at the same time he was convinced beyond a reasonable doubt that they inflicted the internal injuries. Obviously, such a conclusion is preposterous.

An examination of the questioning by the defense shows that Dr. Stein was testifying that the "injuries" that caused the death of Richard Ramey occurred within two hours of his death. And to say no questions were ever raised as to when the internal injuries to the deceased had occurred is manifestly untrue and

displays a fatal misconception on the part of the judge as to what the evidence was. Dr. Stein's opinion was that Ramey's death was caused by "external and internal injuries due to blunt trauma." Moreover the record does not show any questioning of Dr. Stein by the court. The judge did question a Dr. Hallenbeck, who testified for the defense.

There can be no doubt that the trial judge was confused about this vital aspect of the defendants' case, even to the point that he could not keep the testimony of the two experts straight in his mind. The trial court's remarks disclose a misunderstanding and confusion over a vital piece of evidence submitted by the defense. This denied the defendants the right to a fair trial. In People v. Bowie, 36 Ill. App.3d 177, 343 N.E.2d 713, 715, the Appellate Court held that it is a denial of due process of law for a court to consider matters outside the record and similarly, that the trial judge must consider all the matters

in the record before deciding the case. "Where a record affirmatively indicates, as in the instant case, that the trial judge did not remember or consider the crux of the defense when entering judgment" the defendant did not receive a fair trial.

The error itself was bad enough; but it was most disturbing to read the Appellate Court opinion and to see the Appellate Court ignore this argument of the defendants. See also People v. Morgan, 44 Ill. App.3d 730, 358 N.E.2d 909, 912.

The record shows that Dr. Stein refused to turn over certain X-rays to the defense even to the point where the trial judge discussed the possibility of imposing sanctions against him. Finally, after lengthy motions and long delays, Dr. Stein turned over 10 X-rays to the defense. One of the X-rays showed the sixth cervical vertebra of the deceased which Dr. Stein said had a through and through fracture. Dr. George Hallenbeck, a radiologist, testified

for the defense. He said he could not find any abnormalities in the X-ray of the neck. He could see the lateral view or side view of the upper three cervical vertebrae, that they seemed to be intact. It did not appear that there were any cracks or fractures or any breaks in that area. They appeared in good alignment too. He did not see any displacement of those bodies in relation to their normal position. As is obvious, the X-ray, which Dr. Stein tried to hide, refutes his testimony that there was a through and through fracture of the neck. The record specifically discloses that the trial judge did not consider the X-ray.

In his argument before the court, the prosecutor said that the X-rays mean nothing and that Dr. Hallenbeck's testimony meant nothing. In announcing his decision, the court said this:

With reference to the X-rays that were introduced, there was never a foundation as to the origin, when or who took them. It is not for the court to act as

advocate in a trial. The presumption at law states that the court excludes all improper evidence in reaching its decision.

It is inescapable that the court erroneously refused to consider evidence which was properly before him. Assuming, solely for the sake of argument, that a proper foundation had not been laid for the introduction of the exhibits (which had been offered and received over objection by the State) the X-rays were still properly before the court and should have been considered. The trial court obviously was under the misapprehension that it could not consider any evidence which it deemed to be inadmissible, even in the absence of any proper objection. That conception of the court is clearly erroneous. We again refer to the language of People v. Bowie, 36 Ill. App.3d 177, 343, N.E.2d 713, 715 wherein the court held that a refusal of a trial judge to "consider the crux of the defense when entering a judgment" the defendant did not receive a fair trial and

due process. Moreover, the judge compounded the error by erroneously concluding that no foundation had been established. The X-rays had been turned over to the defense by the State and were represented by the State to be the X-rays taken by the medical examiner of the body of Richard Ramey. Dr. Hallenbeck was able to interpret the X-rays. No more foundation was necessary. That representation was tantamount to an admission of genuineness. The State's Attorney recognized that a proper foundation had been established. On the question of the refusal of the court to consider evidence for comparison purposes we refer to United States v. Infelice, 506 F.2d 1358 (7th Cir. 1974).

This denial of due process did not become apparent to the defendants until after the trial. Consequently, this constitutional question was first raised in the Appellate Court.



## II.

THE APPELLATE COURT OPINION SANCTIONS A DENIAL OF THE DEFENDANT KLISZ'S FIFTH AMENDMENT RIGHT WHERE THE RECORD SHOWS THAT THE PROSECUTION BROUGHT OUT THAT HE HAD REFUSED TO MAKE A STATEMENT IN THE PRESENCE OF A COURT REPORTER.

At the beginning of the cross-examination of Klisz, the prosecutor asked if he had been given the chance to give a court reporter statement. Later he again asked whether Klisz had been given an opportunity to make a court reporters statement to an Assistant State's Attorney and whether he refused. He answered, over objection, that he had refused. This we maintained was prejudicial error.

There seems no more fundamental rule of criminal law than that protecting the right to remain silent. In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 this court held that the prosecutor's use of post-arrest silence to impeach the defendant's exculpatory story told at trial violated the Due Process Clause of the Fourteenth Amendment.

Illinois courts have recognized the Doyle violation as plain error. (People v. Hooker, 54 Ill. App.3d 53, 369 N.E.2d 147; People v. Suggs, 50 Ill. App.3d 778, 365 N.E.2d 1118) See also People v. Lewerenz, 24 Ill.2d 295, 180 N.E.2d 99.

#### CONCLUSION

For all these reasons we respectfully pray that this court will order that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First District.

Respectfully submitted,

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